COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2688 **Cir. Ct. No. 2004CV138**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

GARY L. JANZ, BOBBI JANZ, WILLIAM R. TOMLINSON, LYNNE B. TOMLINSON, ALBERT PESKO AND ARLENE PESKO,

PLAINTIFFS-APPELLANTS,

V.

MARK FERKEY AND FERKEY REVOCABLE TRUST DATED JULY 9, 1993 C/O MARK FERKEY, TRUSTEE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Six plaintiffs appeal an order that dismissed their complaint seeking to enforce a restrictive real estate covenant. They claim the circuit court erred in determining the language of the document creating the

covenant is ambiguous regarding what land is restricted to residential use. We conclude the "area of application" language of the covenant is ambiguous when read together with related language in the covenant.

¶2 The plaintiffs brought this declaratory judgment action against the Ferkey defendants for violation of a restrictive covenant. The circuit court concluded that certain language in the covenant document was ambiguous, and therefore must be construed to allow free use of the property. Based on that conclusion, the court entered judgment in favor of the defendants. The dispositive issue on appeal is whether the language is ambiguous. We conclude that, when the language of paragraphs B-1 and C-1 are considered together, an ambiguity is created regarding whether the covenants apply to only the lots platted in the Morning Side Acres subdivision or to all of the land lying within the forty-acre parcel described in paragraph B-1.

¶3 A restrictive covenant provision is ambiguous if it is susceptible to more than one reasonable interpretation. ***Zinda v. Krause***, 191 Wis. 2d 154, 165-66, 528 N.W.2d 55 (Ct. App. 1995). Whether the language of a restrictive covenant is ambiguous is a question of law we decide independently from the circuit court. ***Id.*** at 165. Paragraph B-1 of the covenant document, entitled "Area of Application," identifies the area of land to which the substantive covenants that follow are to apply: "The residential area covenants in Part C in their entirety shall apply to the Northwest Quarter (NW 1/4) of the Northeast Quarter (NE 1/4) of Section Eight (8) Township Twenty-one (21), North of Range Six (6) East, Wood County, Wisconsin, and to apply to said property when platted."

¶4 The focus of the parties' arguments is on the final phrase, "and to apply to said property when platted." The plaintiffs argue that this phrase is a

further emphasis or clarification that the covenants will continue to apply even after property is platted. The Ferkey defendants argue, and the circuit court agreed, that this phrase can also reasonably be read as meaning that the restrictions do not apply until the property is platted. In other words, the restrictions were to apply to the land described only if and when the property is platted. The circuit court considered only the language in paragraph B-1 when it granted summary judgment to the Ferkey defendants, concluding that the final phrase created the ambiguity the defendants suggested.

¶5 When interpreting a restrictive covenant, however, we are not to view the disputed language in isolation to determine whether ambiguity exists. Rather, we must determine whether the "area of application" language in the present document is ambiguous when read within the context of related provisions in the document. *See* ***Zinda***, 191 Wis. 2d at 166-67. The only substantive restrictions contained in the document are set forth in "Part C" of the document, entitled "Residential Area Covenants," which follows the "Preamble" ("Part A") and the "Area of Application" ("Part B"). Part C begins with paragraph C-1, which reads as follows: "Covenants and restrictions hereinafter following *shall apply to all lots in the entire subdivision* except where specific designation as to a specific lot shall be made" (emphasis added). The very first restriction which follows is the one at issue in this case: "No *lot* shall be used except for residential purposes" (emphasis added).

¶6 We conclude that the language in Part C may reasonably be read to mean that the residential use restriction applies to only "lots" included within the "subdivision" plat of Morning Side Acres, and not to the "unplatted lands" to the

north of the subdivision, which is where the property at issue in this case lies.[1] As we have described, Paragraph B-1 declares that the "residential area covenants in Part C in their entirety shall apply to the [forty acres described], and to apply to said property when platted." When this language is read in conjunction with the emphasized language of paragraph C-1 quoted above, a reasonable interpretation, if not a plainly required reading of the document as a whole, is that the owner/declarant intended to create a "platted" "subdivision" of residential lots, encompassing all or some part of the described forty, to which the restrictions in the recorded document are to apply.

¶7 That an ambiguity is created when the language of paragraph C-1 is considered may perhaps be illustrated by considering the applicability of the covenants had *no* part of the forty acres been subsequently platted as a subdivision. That is, suppose the forty had been subsequently conveyed, ten acres each, to four different purchasers, employing fractional quarter-quarter-section descriptions (e.g., "the north ten acres of the NW1/4 of the NE1/4 of Section 8"). An owner of one of these parcels would be hard pressed to convince a court that the restrictive covenant at issue unambiguously precludes a neighboring owner from using his or her land for anything other than residential purposes. In other

[1] The plaintiffs argue that we must interpret the terms "platted" and "subdivision" according to their "common" meanings as found in lay dictionaries, as opposed to their statutory meanings as set forth in WIS. STAT. ch. 236 (1961-62). We disagree. Because the declarants of the restrictions at issue caused a portion of the described forty to be platted as a subdivision several months after recording the restrictions, and because the plat of Morning Side Acres specifically recites its compliance with ch. 236 (1961-62), we conclude that it is at least reasonable, if not more reasonable, to conclude the terms should be given their statutory meanings. The relevant statutes defined "plat" as "a map of a subdivision," § 236.02(5) (1961-62), and "subdivision" as "a division of a … tract of land by the owner thereof … for the purpose of sale or of building development, where … [t]he act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area." WIS. STAT. § 236.02(8)(a) (1961-62).

words, an owner of one of these hypothetical parcels who wished to develop it for commercial purposes could reasonably maintain that the four parcels were not "lots in [a] subdivision" to which the restrictions in Part C are expressly declared to apply.

¶8 If the covenant document is ambiguous regarding the application of the covenants had no subdivision ever been platted, that same ambiguity exists on the present facts regarding whether the restrictions in the document apply to any land that never became a "lot[] in the entire subdivision," as paragraph C-1 specifies. Because the document is (at least) ambiguous regarding whether the restrictions apply to land outside the plat of Morning Side Acres, and because we are required to construe ambiguous restrictions "to favor unencumbered and free use of property,"[2] we affirm the appealed order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

[2] ***Crowley v. Knapp***, 94 Wis. 2d 421, 434, 288 N.W.2d 815 (1980).